IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 18, 2008 Session

STATE OF TENNESSEE v. GLENN E. PRESSINELL

Appeal from the Criminal Court for Johnson County
No. 5117 Lynn W. Brown, Judge

Nos. E2008-01290-CCA-R3-CD - Filed February 10, 2009
E2008-01735-CCA-R3-CD[1] - Filed February 10, 2009

The defendant, Glenn E. Pressinell, pleaded guilty in the Johnson County Criminal Court to one count of solicitation of sexual exploitation of a minor, *see* T.C.A. § 39-13-529(b)(1) (2006), and the trial court imposed a five-year sentence to be served as 90 days' incarceration followed by 15 years' probation. In this consolidated appeal, the defendant contends that the trial court erred by ordering, as a condition of the defendant's probation, that the defendant not reside within one mile of the victim and that the trial court erred by concluding, following the revocation of the defendant's probation, that he was required to comply with the sexual offender directives. Because the trial court has not yet revoked the defendant's probation and because no appeal as of right lies from an order modifying the conditions of probation, the appeal in case number E2008-01735-CCA-R3-CD must be dismissed. Because the trial court erred by imposing an onerous condition of probation, the judgment of the trial court in case number E2008-01290-CCA-R3-CD must be modified to reflect the removal of the condition that the defendant relocate more than one mile from the victim.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed as Modified; Appeal Dismissed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Jason A. Creech, Mountain City, Tennessee, for the appellant, Glenn E. Pressinell.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Glen Anthony Wade, District Attorney General; and Kent Garland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

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[1] The defendant first appealed the terms of his sentence in appeal number E2008-01290-CCA-R3-CD on July 6, 2008. On July 29, 2008, the trial court altered the conditions of his probation. The defendant appealed that order in case number E2008-01735-CCA-R3-CD. Upon the request of the defendant, this court consolidated the cases into appeal number E2008-01290-CCA-R3-CD.

I. Procedural History

A review of the complex procedural history of this case is necessary to place the issues into the proper context. On August 2, 2007, a Johnson County Grand Jury indicted the defendant with one count of solicitation of sexual exploitation of a minor. On March 28, 2008, the defendant entered a plea of guilty to the charged offense, and, following a sentencing hearing on April 8, 2008, the trial court imposed a sentence of five years to be served as 90 days' incarceration followed by 15 years' probation. In addition to the standard probationary conditions, the trial court also ordered that the defendant complete sexual offender counseling and treatment, that he refrain from unsupervised contact with minors, that he wear clothing that makes it difficult for him to expose himself, and that he relocate to a residence at least one mile from the victim. Although a judgment form was partially completed by the trial court on April 8, 2008, this judgment was apparently never entered into the minutes of the court.[2]

On April 10, 2008, the defendant filed a "Motion to Alter or Amend Probation Order or, in the Alternative To Stay Judgment Pending Appeal." In his motion, the defendant alleged that the condition of his probation requiring that he relocate more than one mile from the victim was unreasonable. The defendant also asked that the trial court file a corrected judgment because the April 8, 2008 judgment form did not reflect the defendant's plea or the class of the conviction offense. Following a May 2, 2008, hearing, the trial court denied the defendant's motion by order dated May 19, 2008.

On June 6, 2008, the case was again placed on the trial court docket for a "proceeding" to correct the incomplete April 8, 2008 judgment form. Following the proceeding, a completed judgment form was entered into the minutes on June 6, 2008. The defendant filed a notice of appeal in this court on that same date. In his appeal, he claimed that the trial court erred by ordering that he relocate as a condition of probation.

On July 18, 2008, a probation violation warrant issued alleging that the defendant had violated the terms of his probation by failing to advise his probation officer of a change of address, by failing to allow his probation officer to inspect his residence, and by failing to abide by the sexual offender directives contained in Code section 39-13-706. After a "conference" regarding the violation warrant, the trial court entered an order on July 29, 2008, granting the defendant bond pending the revocation of his probation and ordering that he register as a sexual offender and comply with the sexual offender directives as a condition of his probation.[3] On August 1, 2008, the defendant filed a notice of appeal from the July 29, 2008 order. On August 8, 2008, the defendant moved this court to consolidate the appeals into a single case.

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[2] As we will explain in more detail below, an affidavit completed by Johnson County Criminal Court Clerk Carolyn Hawkins indicates that Ms. Hawkins did not enter the April 8, 2008 judgment into the court minutes because it was incomplete.

[3] A transcript of this proceeding was not made a part of the record on appeal, and subsequent action by the trial court indicates that this was not a hearing on the probation violation.

On October 29, 2008, the trial court entered an order requiring the defendant to comply with the sexual offender directives pending this court's opinion. The trial court also declared "that the violation issue shall be stayed pending the [d]efendant's appeal" because "there was much confusion regarding the requirements of the [d]efendant's probation."

II. Jurisdiction

A. Case Number E2008-01290-CCA-R3-CD

The State contends that the defendant's appeal of the conditions of his probation should be dismissed as untimely. The defendant insists that the notice of appeal was timely-filed.

The confusion regarding the time for filing the notice of appeal stems from the fact that although a judgment form was at least partially completed on April 8, 2008, the final judgment was not actually entered into the trial court minutes until the corrected judgment form was completed on June 6, 2008. In an affidavit attached to the defendant's response to a show cause order from this court, Johnson County Criminal Court Clerk Carolyn Hawkins stated that she was unable to enter the April 8, 2008 judgment into the minutes because "there was no plea information whatsoever, regarding Mr. Pressinell." When the clerk realized that the incomplete judgment form "could not [be] enter[ed] into the minutes of the court," she placed the matter on the trial court docket "so that order could be corrected, become final and so that [she] could finally enter the final corrected judgment into the minutes of the court." Following a June 6, 2008 proceeding wherein "the trial court signed the final judgment," Ms. Hawkins "entered the final June 6th order in the minutes of the court."

Because the April 8, 2008 judgment form was not actually entered into the minutes of the trial court, it could not have operated as the final judgment of that court. *See Mullen v. State*, 51 S.W.2d 497, 498, 164 Tenn. 523, 528 (1932) ("[C]ourts speak only through their minutes. . ."). In consequence, the June 6, 2008 judgment that was duly entered into the minutes of the trial court is the final judgment for purposes of timing the filing of the notice of appeal in this case. Thus, the defendant's notice of appeal filed on June 6, 2008, was timely and the appeal is properly before this court.

B. Case Number E2008-01735-CCA-R3-CD

According to the defendant's motion to consolidate his cases, the trial court held a "conference" on July 21, 2008, regarding the probation violation warrant filed on July 18, 2008. The purpose of the conference, as related in this court's order consolidating the cases, was to discuss the defendant's bond pending revocation and to "discuss the position taken by the Board of Probation and Parole that the nature of the defendant's conviction offense required him to register as a sexual offender and comply with the related monitoring directives." On July 29, 2008, the trial court entered an order setting the defendant's bond at $1,000 and requiring that he "register as a sex offender with his probation officer pursuant to this court's finding that [the] [d]efendant pled guilty to a 'sexual offense' under T.C.A. § 40-39-202(17)(xvi)." The defendant filed a notice of appeal from this order on August 1, 2008.

On October 29, 2008, the trial court entered an order confirming that the defendant "shall be required to follow the sex offender directives" pending the outcome of his appeal. The trial court also ruled "that the violation issue shall be stayed pending the [d]efendant's appeal."

From all this we glean that the defendant's probation has not yet been revoked, and thus, no appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure exists. Moreover, although the trial court modified the conditions of the defendant's probation in its July 29, 2008 order, no appeal as of right will lie from the trial court's modification of probationary terms. *See State v. Lane*, 254 S.W.3d 349, 352 (Tenn. 2008). In addition, the supreme court made clear in *Lane* that when a defendant challenges only the merits of the trial court's decision and does not allege a "'plain and palpable abuse of discretion,'" treatment of the appeal as a common law petition for writ of certiorari is inappropriate. *Id.* at 356.

"[T]his court may," however, "treat an improperly filed Rule 3 appeal as a Rule 10 extraordinary appeal." *State v. Norris*, 47 S.W.3d 457, 463 (Tenn. Crim. App. 2000) (citing *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998)). Rule 10 of the Tennessee Rules of Appellate Procedure provides that an extraordinary appeal may be sought "if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review or . . . if necessary for complete determination of the action on appeal." Tenn. R. App. P. 10(a). Before an extraordinary appeal will be granted, the party appealing must establish that: (a) "the ruling of the court below represents a fundamental illegality," (b) "the ruling constitutes a failure to proceed according to the essential requirements of the law," (c) "the ruling is tantamount to the denial of either party of a day in court," (d) "the action of the trial judge was without legal authority," (e) "the action of the trial judge constituted a plain and palpable abuse of discretion," or (f) "either party has lost a right or interest that may never be recaptured." *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980) (finding that the principles required for the common law writ of certiorari are applicable to applications for extraordinary appeal under Rule 10). Utilizing these factors, the grant of a Rule10 appeal is not appropriate in this case.

Because the defendant has no appeal as of right from the trial court's July 29, 2008 order and because we decline to treat the improperly filed Rule 3 appeal as an application for extraordinary appeal, the appeal in case number E2008-01735-CCA-R3-CD must be dismissed.

III. Reasonableness of Probation Conditions

The defendant contends that the trial court erred by ordering that he relocate to a residence no less than one mile away from the victim. The State submits that the condition is reasonably related to the conviction offense.

Our inquiry into the reasonableness of the challenged probation condition must necessarily begin with a brief recitation of the facts of the offense. Because the transcript of the guilty plea submission hearing was not included in the appellate record, we glean the following facts from the affidavit of complaint provided by the victim's mother:

> On Saturday November 22, 2006[,] at 12:00 p.m.[,] my daughter came to me and told me my neighbor Gle[n]n Pres[si]nell was wiggling his wee wee and looking at her with binoculars so I told her to stay in the house and I went to see what I could see[.] When I got around the building between my house and his I saw him mast[u]rbating and when he . . . saw me he stopped and hid[] himself. I was about 50ft from him. When Mr. Pres[si]nell he[a]rd me tell him I was calling the law he picked up the binoculars and looked at me. I came back to the house and called the police. My daughter had a friend over. . . . She also saw Mr. Pres[si]nell. . . . [The victim] . . . is eight years old and [her friend] is seven years old.

At the sentencing hearing, the defendant admitted masturbating in front of the young girls, explaining, "I done it and I regret it. I shouldn't have done it." The defendant insisted that he had not engaged in any similar conduct since the offense and stated that, due to his failing health, he was "not able to" get an erection.

The victim's mother testified that the victim was severely traumatized by the offense. She stated that the victim refused to play outside because she knew the defendant was next door and that she refused to sleep alone. She related that the victim panics anytime she sees the defendant or his vehicle near their home. She also testified that the defendant had exposed himself to her older daughter approximately ten years before the offense at issue. At that time, she called the police, but the defendant was only given a warning.

At the conclusion of the sentencing hearing, the trial court imposed the agreed sentence of five years but ordered that, instead of full probation, the defendant would be required to serve 90 days' incarceration followed by 15 years' probation. As a condition of his probation, the trial court ordered the defendant "to find some place else to live." The court explained, "There's no use in this little girl continuing to be traumatized because of what [the defendant] did. She didn't do anything wrong. She's innocent, and she's suffering apparently every day because of what [the defendant] did." The court ruled that the defendant could not live "within a mile of" the victim and that he was to "have absolutely no contact" with the victim and further ordered that he "not pass" the victim's residence for any reason. The trial court acknowledged that the defendant was not required to comply with the registration and monitoring requirements for sexual offenders because he was not convicted of a "sexual offense" as that term is defined by statute.[4]

[4]The trial court's original interpretation was correct. The defendant was not convicted of a "sexual offense" as that term is defined in Tennessee Code Annotated section 40-39-202, which provides, in pertinent part that "'sexual offense' means. . . [t]he commission of any act that, on or after November 1, 1989, constitutes the criminal offense of . . . [e]xploitation of a minor *by electronic means*, under § 39-13-529." T.C.A. § 40-39-202(20)(xvii) (2006) (emphasis added). As the State concedes in its brief, the defendant did not commit the conviction offense by electronic means. Accordingly, the defendant is not a "sexual offender" as that term is used in the Code.

The Sentencing Act provides that "the trial court has great latitude in formulating punishment, including the imposition of conditions on probation." *State v. Burdin*, 924 S.W.2d 82, 85 (Tenn. 1996). The primary purpose of a sentence of probation, however, "is rehabilitation of the defendant," *id.* at 86, and the conditions of probation must be suited to this purpose. "Once the trial judge determines that probation is justified under the circumstances, the conditions imposed must be reasonable and realistic and must not be so stringent as to be harsh, oppressive or palpably unjust." *Stiller v. State*, 516 S.W.2d 617, 620 (Tenn. 1974). The Act does not grant to the trial court "unfettered authority" to impose any condition on the defendant's probation but limits the court's discretion to "the bounds of traditional notions of rehabilitation." *Burdin*, 924 S.W.2d at 87; *see also State v. Mathes*, 114 S.W.3d 915, 918 (Tenn. 2003) (disapproving probation condition that did "not serve either the goal of rehabilitation or the goal of deterrence); *State v. Robinson*, 139 S.W.3d 661, 666 (Tenn. Crim. App. 2004). That being said, however, the burden of demonstrating the impropriety of a probation condition rests with the defendant. *Burdin*, 924 S.W.2d at 84.

In this case, the trial court ordered that as a condition of his probation the defendant relocate from his residence of 30 years. This condition, like that imposed in *Burdin*, "is not expressly or implicitly authorized by the Act" for the conviction offense. *Burdin*, 924 S.W.2d at 87. We were unable to find another case in this State approving the imposition of a similar probation condition on a defendant who did not qualify as a sexual offender. Moreover, the record does not support a finding that the condition was either realistic or reasonably related to the offense in this case. As indicated, the defendant is 60 years old, unemployed, and disabled. The trial court stated that the defendant and his wife had the option of selling their home or living apart. Neither option, in our assessment, was realistic given the defendant's circumstances.

In addition, although it is likely that the offense was in some way facilitated by his proximity to the victim, it does not follow that the defendant's vacating the residence will prevent him from exposing himself in the future. The trial court candidly admitted that the purpose of the condition was the well being of the victim rather than the rehabilitation of the defendant. Although we appreciate the trial court's desire to protect the victim from further harm, "the primary goal of probation is the rehabilitation of the defendant." *Id.* at 85. Probation conditions that do not serve the goals of rehabilitation or deterrence are not reasonable. *Burdin*, 924 S.W.2d at 87; *see also Mathes*, 114 S.W.3d at 918; *State v. Bouldin*, 717 S.W.2d 584, 587 (Tenn. 1986).

Finally, the ordered relocation is too indefinite to be reasonable or realistic. Although the parties assume that the trial court's order will remain in effect only for the duration of the defendant's probation, the order itself does not specify a time frame. Even where a condition "is consistent with traditional notions of rehabilitation, a court must take care that the condition is not needlessly broad, i.e., needlessly restrictive of a defendant's liberty, and that the condition is closely tailored to the circumstances of a particular case." *State v. Robert Lewis Herrin*, No. M1999-00856-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, Feb. 9, 2001). Thus, even had we deemed the relocation condition generally appropriate to this conviction and offender, the order in this case is too broad to be reasonable. *See Bouldin*, 717 S.W.2d at 587 (overruling

condition of probation in part because the duration of the condition was "too indefinite in the trial court's order").

IV. Conclusion

Because the trial court's order that the defendant relocate more than one mile from the victim serves neither the goal of rehabilitation nor the goal of deterrence and because the parameters of that order are far too broad, we modify the order of probation to remove relocation as a condition of probation. However, because we are mindful of the potential for harm to the victim, we order that the defendant is to have absolutely no contact with the victim for the duration of his 15-year probationary term.

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JAMES CURWOOD WITT, JR., JUDGE